IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1779

NOE VASQUEZ-RAMIREZ
AGENCY No. A76-004-178

Appellant-Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Appellee-Respondent.

PETITION FOR REVIEW

BRIEF OF APPELLEE-RESPONDENT ALBERTO GONZALES ATTORNEY GENERAL OF THE UNITED STATES

Todd P. Graves
United States Attorney

Lucinda S. Woolery
Assistant United States Attorney
Charles Evans Whittaker Courthouse
400 East 9th Street, 5th Floor
Kansas City, Missouri 64106
Telephone: (816) 426-3130
Facsimile: (816) 426-3165
Attorneys for Appellee-Respondent

SUMMARY OF THE CASE

This is an immigration appeal. The Immigration and Naturalization Service ("INS") served notice on petitioner Noe Vasquez-Ramirez that he was subject to removal to Mexico because he had violated the terms of his border crossing card. He applied for cancellation of removal under the Immigration and Nationality Act ("Act"). Immigration Judge ("IJ") O. John Brahos held that he had not met his burden for cancellation of removal. *See* 8 U.S.C. § 1229b.

Petitioner appealed to the Board of Immigration Appeals ("BIA), which affirmed the IJ's decision on October 25, 2002. Petitioner filed a motion to reopen, offering evidence that his family would suffer hardship if returned to Mexico. On April 30, 2003, the BIA denied petitioner's motion to reopen because he had failed to present new and material evidence.

On October 31, 2003, petitioner filed a second motion to reopen to seek asylum or withholding of removal under the Convention Against Torture ("CAT"). On March 3, 2004, the BIA denied petitioner's motion because federal regulations did not permit him to file a second motion to reopen, and he had failed to make a *prima facie* case for asylum or other relief.

Petitioner has appealed to this Court. He has not requested oral argument. Respondent also does not seek oral argument.

TABLE OF CONTENTS

Page

ARGUMENT

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Other Authorities

JURISDICTIONAL STATEMENT

This Court has jurisdiction over petitioner Noe Vasquez-Ramirez's petition for review pursuant to Section 242(a)(1) of the Act, 8 U.S.C. § 1252(a)(1) (2004), which confers exclusive jurisdiction on the courts of appeals to review final orders of removal. The BIA entered its order on March 3, 2004. (A.R. 2).[1] The petition for review was timely filed on April 1, 2004, within thirty days of that order. Venue properly lies in this Court because petitioner's immigration proceedings were completed within this judicial circuit. *See* 8 U.S.C. § 1252(b)(2).

[1] The abbreviation "A.R." refers to the Certified Administrative Record on file with the Court. "Pet. Br." refers to Petitioner's Opening Brief.

STATEMENT OF THE ISSUES

I. Whether the BIA erred in holding that petitioner's motion to reopen was barred when federal regulation allows only one motion to reopen in these circumstances, and petitioner did not establish that he was entitled to equitable tolling based on ineffective assistance of counsel.

8 C.F.R. § 1003.2(c)(2)

Nativi-Gomez v. Ashcroft, 344 F.3d 805 (8th Cir. 2003)

In re Lozada, 19 I. & N. Dec. 637 (BIA April 13, 1988)

Hernandez-Moran v. Gonzales, 408 F.3d 496 (8th Cir. 2005)

II. Whether the BIA abused its discretion in denying petitioner's motion to reopen when he failed to establish a *prima facie* case for asylum or other relief.

INS v. Abudu, 485 U.S. 94 (1988)

Feleke v. INS, 118 F.3d 594 (8th Cir. 1997)

Regalado-Garcia v. INS, 305 F.3d 784 (8th Cir. 2002)

STATEMENT OF THE CASE

On April 22, 1998, the INS served petitioner Noe Vasquez-Ramirez with a Notice to Appear, alleging that he was subject to removal for failing to comply with the terms of his border crossing card. (A.R. 646). He sought cancellation of removal, but the IJ denied his application. (A.R. 217). He then appealed to the BIA, which affirmed the IJ's decision. (A.R. 179). Petitioner filed a motion to reopen with the BIA on January 21, 2003. (A.R. 85). The BIA denied the motion to reopen on April 30, 2003 because he had failed to establish new and material evidence. (A.R. 75).

On October 31, 2003, petitioner filed a second motion to reopen with the BIA so that he could request asylum or withholding of removal under the CAT. (A.R. 11). On March 3, 2004, the BIA denied petitioner's motion to reopen because federal regulation permitted him to file only one motion to reopen in the circumstances of this case. It also ruled that he had failed to make a *prima facie* case for asylum or other relief. (A.R. 2).

On April 1, 2004, petitioner timely filed his petition for review.

STATEMENT OF FACTS

I. Proceedings before the IJ

A. Petitioner's testimony

A telephone hearing before the IJ was held on February 2, 1999. Petitioner was represented by James S. Phillips, Jr. Mr. Vasquez-Ramirez testified that he was also known as Victor Calvio. (A.R. 236). He admitted the allegations in the Notice to Appear and designated Mexico in the event he was removed. (A.R. 239).

The hearing was continued to November 18, 1999. Petitioner appeared with his counsel, Mr. Phillips. He presented evidence regarding his work history and physical presence in the United States. The IJ noted that he was aware that Mexicans with border crossing cards would cross the border to work in Texas. (A.R. 254).

Mr. Vasquez-Ramirez testified that he was thirty-one years old. He got his GED in 1999 and a scholarship to pursue his education. In Mexico, he had completed the ninth grade and worked after he graduated. He started working at a gasoline station when he was seven years old. (A.R. 263-64). He had ten bothers and sisters; all siblings except two were in the United States. One sister in Mexico lived on a farm, and the other was married to a policeman. Both sisters had

families. (A.R. 266-68). He testified that his mother lived in Juarez, Mexico, and his father was deceased but used to be a policeman. (A.R. 269-71).

Petitioner testified that he was last in Juarez in 1986. (A.R. 276). In Mexico, he had sold shrimp on the streets, worked as a stock boy at a store, and worked as a machine operator. (A.R. 278-80). He was nineteen years old when he came to the United States, and said he came for economic reasons. (A.R. 281). He had a border crossing card that permitted him to remain in the United States for a maximum of seventy-two hours within a limited geographical area. He acknowledged that he did not fulfill those requirements. (A.R. 282-83). When he entered in November of 1986, he lived with his sister in El Paso, Texas, and worked construction. (A.R. 284-86). He said that his employer, V&R Drywall, did not ask him to document his status, although the laws at the time required such proof. (A.R. 288).

Mr. Vasquez-Ramirez testified that he was married in Juarez in October 1986. (A.R. 291). His wife had visited her mother in Juarez, and both his mother and her mother had visited his family in the United States. (A.R. 292). He said his mother had high blood pressure and diabetes and was treated in Mexico. (A.R. 293-95).

In 1991, he moved to Liberal, Kansas, and worked at Liberal Feeders operating heavy equipment. (A.R. 296-97). He ceased working for them in August 1999 to start working at National Beef. (A.R. 299). He did maintenance work for National Beef. (A.R. 302). He described his job benefits, including insurance. (A.R. 303-05).

Mr. Vasquez-Ramirez testified that he had attended church in Liberal since he moved there in 1991. He also said he showed young boys how to play soccer, and sometimes he went with his family to the park and to stores. (A.R. 309-10). He had started taking English classes the previous year. He qualified for his GED in one month. (A.R. 311).

Petitioner's United States-born children were ages five and two and one-half years. (A.R. 312). They saw his two brothers and their families every day. He owned his own home; he had bought it that year. He bought the house for $9,000 and was fixing it up himself. (A.R. 313-14). He borrowed $6,000 but only owed $1,000. (A.R. 316). He estimated the value of the house at $22,000. (A.R. 317).

Mr. Vasquez-Ramirez testified as to his family's health and activities. His younger daughter was born with a "ball" on her head but the medical records indicated she was healthy. (A.R. 319-21). His wife's health was good. His older

daughter, Karina, attended kindergarten from 12 to 3 p.m. every day, and had started school in September of that year. (A.R. 324-25). His family attended Mass every week. (A.R. 326). He testified that he had seven nieces and nephews in Liberal, Kansas, and two in Juarez. (A.R. 328). His daughter Karina spoke English. Her mother spoke Spanish in the home, and both Spanish and English might be spoken when Mr. Vasquez-Ramirez was home. (A.R. 329). He testified that if he was required to return to Mexico, he would take his daughters with him. (A.R. 329).

Mr. Vasquez-Ramirez stated that he had not ever been arrested for driving under the influence of alcohol nor treated for any mental health problems in the United States. (A.R. 330). He had never used or sold illegal drugs, and he had never been arrested for or convicted of any crimes in the United States. (A.R. 330-31).

He testified that he understood that a border crossing card required him to return to Mexico at night after work, but acknowledged that he had wanted to live in the United States. He did not use his border crossing card to obtain a job in El Paso. (A.R. 332-33).

Mr. Vasquez-Ramirez said he began working for Liberal Feeders in Liberal, Kansas, in 1991 using the name Victor Ponce Calvio. He got that name from a borrowed Social Security card and used it until he got his first permit to work in 1998. (A.R. 333-34). When he obtained the permit to work, it was his first INS permission to work. (A.R. 334). He testified that he did not have anything to show that he and Victor Ponce Calvio were the same person. (A.R. 334-35). Although people from his job might identify him, he did not have any witnesses at the hearing. (A.R. 335).

Mr. Vasquez-Ramirez said that he did not think that Mexico's education of children had changed much since he went to school. When asked if he knew that free education through the ninth grade was now mandatory in Mexico, he responded that he did not know that. (A.R. 336-37). His two and one-half year old daughter did not attend school; she stayed at home with his wife. (A.R. 338).

He testified that he had a Texas identification card with a Fort Stockton, Texas, address because he needed to obtain a driver's license for his job in Kansas. (A.R. 339-40). He admitted that he had lied when he told authorities in Texas that he was a resident there. The IJ characterized this as a fraud on the State of Texas. (A.R. 340-41).

B. The documentary evidence before the IJ

The IJ considered the following documentary evidence:

- the Notice to Appear, Form I-862, dated April 22, 1998, and related documents (A.R. 646).

- The Mexico Country Report on Human Rights Practices for 1998 released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State (A.R. 363).

- Article entitled *Structural Adjustment and the Polarization of Mexican Society* by Carlos Heredia and Mary Purcell (A.R. 415).

- Newspaper article entitled *Mexico Braces for Economic Turmoil* by Adolfo Garza, Associated Press writer, August 22, 1998 (A.R. 429).

- Human Rights Watch World Report 1999 for Mexico (AR. 432).

- Letter from Reverend Henry F. Hildebrandt to INS dated October 25, 1999 (A.R. 445).

- Statement of Good Deal Used Cars dated April 4, 1997 (A.R. 447).

- Letter from National Beef Packing Company dated October 5, 1999 (A.R. 449).

- Affidavits of residency (A.R. 451).

- Record as to real estate transaction (A.R. 459).

- American Family Insurance Group homeowner policy rate quote (A.R. 461).

- Information regarding health insurance coverage (A.R. 463).

- Letter from NationsBank dated March 7, 1997 (A.R. 469).
- Records of petitioner's relatives (A.R. 471).
- Petitioner's Texas identification card (A.R. 474).
- Petitioner's employment authorization card (A.R. 476).
- Letters from Kansas Department of Revenue dated August 18, 1999 (A.R. 478).
- Letter from Southwest Medical Center Specialty Clinics dated October 22, 1999 (A.R. 481).
- Tax returns and related documents (A.R. 482).
- Petitioner's Application for Cancellation of Removal with attached exhibits (A.R. 539).

C. The IJ's decision

On November 18, 1999, the IJ issued his oral decision. (A.R. 218). The IJ found that petitioner had not met his burden of proof to show physical presence in the United States for at least ten years immediately preceding the filing of his application. He did not present evidence verifying the name that he had allegedly used in Texas, such as an employer's verification of a photograph attached to a document. (A.R. 220). His possession of a border passing card diminished his claim of physical presence in the United States.

The IJ also found that petitioner had not shown that he was a person of good moral character at the time immediately preceding the filing of his application. The IJ noted that petitioner had committed fraud by representing to Texas authorities that he resided in Texas in order to obtain a Texas identification card when, in fact, he resided in Liberal, Kansas. (A.R. 220-21). The IJ recognized that petitioner did this in order to get a Kansas driver's license but he knew that it was wrong. The IJ also noted that petitioner had violated the terms of his border crossing card. Finally, the IJ considered the fact that petitioner had knowingly used a social security card in the name of an assumed person to obtain employment and concluded that this constituted a fraud on his employers. (A.R. 221-22).

The IJ considered the hardship of removal on petitioner's two children, aged five and two and one-half at the time of the order. The IJ considered that the older child had started school only recently and attended three hours per day. She was in the "preliminary stages of obtaining an education." (A.R. 222). The younger child had not yet started school. The IJ also noted that petitioner had family in Juarez, including his mother and two sisters and their families. The IJ determined that petitioner had not met his burden of showing exceptional and extremely unusual hardship on his children. (A.R. 222-23).

The IJ ordered that petitioner's application for cancellation of removal was denied but that he was granted voluntary departure. He was ordered to post a bond to qualify for voluntary departure. (A.R. 223-24).

II. Proceedings before the BIA

A. The BIA's decision

Petitioner appealed the IJ's decision to the BIA. He filed a notice of appeal on December 16, 1999, and was represented by counsel James S. Phillips, Jr. (A.R. 213).

On October 25, 2002, the BIA issued a per curiam Order affirming without an opinion the IJ's decision. Petitioner was allowed to voluntarily depart from the United States. (A.R. 179).

B. The first motion to reopen

On January 21, 2003, petitioner filed a Motion to Reopen and for a Stay. (A.R. 85). He was represented by counsel Phillips. Petitioner submitted the report of a psychologist who opined that his oldest daughter, Karina, age eight, had an "adjustment disorder with anxiety, severe." (A.R. 86). The psychologist further opined that the psychological effects would be devastating to the family. Petitioner also submitted the U.S. Department of State country report on human rights

practices for Mexico in 2001 as evidence that many children in Mexico have to drop out of school and end up on the streets. (A.R. 86).

On April 30, 2003, the BIA issued its per curiam Order denying petitioner's motion to reopen because he had failed to establish new and material evidence. He had failed to establish a *prima facie* case that any hardship to his child rose to the level of "exceptional and extremely unusual." (A.R. 75).

C. The second motion to reopen

On October 31, 2003, petitioner filed a pro se motion to reopen his case with the BIA to file an application for asylum or withholding of removal under the CAT. (A.R. 11). He attached his Application for Asylum or Withholding of Removal, Form I-589, which stated that he was seeking asylum based on membership in a particular social group. (A.R. 18). He stated that he feared harm or mistreatment in his home country because he feared that might not be able to find a job and support his family. He stated that he feared discrimination against his U.S. born children, and that one child had a psychological impairment and would suffer for not being adequately protected. (A.R. 18).

On March 3, 2004, the BIA issued its per curiam Order denying petitioner's motion to reopen because it exceeded the numerical limitations for motions to

reopen. The BIA noted that federal regulation limited parties to one motion to reopen, with certain exceptions that were inapplicable. (A.R. 2). The BIA held that he had failed to establish "changed circumstances" in Mexico and to make a *prima facie* case for asylum eligibility or other relief. (A.R. 2).

III. Appeal to the Eighth Circuit

On April 4, 2004, Mr. Vasquez-Ramirez filed his petition for review with this Court. He was represented by Mr. Phillips.

SUMMARY OF THE ARGUMENTS

Mr. Vasquez-Ramirez was permitted to file only one motion to reopen his case. Federal regulation imposes this limit and, although there are exceptions, they do not apply here. The Eighth Circuit has not adopted the doctrine of equitable tolling in situations involving ineffective assistance of counsel. Moreover, petitioner was not entitled to effective assistance of counsel in these civil proceedings seeking discretionary relief. Regardless, Mr. Vasquez-Ramirez failed to establish an effective assistance of counsel claim because he made no effort to comply with *Lozada's* requirements or to show how his former counsel's conduct allegedly harmed him.

On the merits, the BIA did not abuse its discretion in denying Mr. Vasquez-Ramirez's second motion to reopen. He failed to establish a *prima facie* case for asylum or other relief. Lack of economic and educational opportunities in these circumstances do not rise to the level of persecution under the Act. Moreover, petitioner's second motion to reopen simply reiterated the evidence and allegations previously asserted.[2]

ARGUMENT

I. The BIA did not err in holding that petitioner's motion to reopen was barred because federal regulation does not permit filing a second motion to reopen in these circumstances; Petitioner did not establish that he was entitled to equitable tolling based on ineffective assistance of counsel.

Mr. Vasquez-Ramirez argues that the BIA erred in holding that his second motion to reopen was time-barred. *See* Pet. Br. at 12. This argument has no merit.

---

[2] The merits of the underlying IJ's decision, denying cancellation of removal, are not properly before this Court. Although petitioner did appeal the merits of that issue to the BIA (A.R. 213), he did not appeal it to this Court. *See* Petition for Review filed in Eighth Circuit on April 1, 2004 (appealing BIA's Order of March 3, 2004); Pet. Br. at 2, 6, 8 (same). Thus, only the BIA's Order of March 3, 2004 is before this Court.

A. Standard of review

The Court reviews questions of law, such as whether the BIA's regulations barred petitioner's second motion to reopen, *de novo*. *See Ateka v. Ashcroft*, 384 F.3d 954, 956 (8th Cir. 2004). To the extent any ambiguity exists in the regulations, the Court gives "substantial deference" to the BIA's interpretation of those regulations. *See id.*

Constitutional claims, including due process claims based on ineffective assistance of counsel, are also reviewed *de novo*. *See Shoaira v. Ashcroft*, 377 F.3d 837, 842 (8th Cir. 2004).

B. Petitioner's successive motions to reopen

After the BIA affirmed the IJ's decision, Mr. Vasquez-Ramirez filed a motion to reopen his proceedings, which was denied. (A.R. 86, 75). He then filed a second motion to reopen, which was also denied. (A.R. 11, 2). In denying the second motion to reopen, the BIA noted that, according to federal regulation, "motions to reopen shall be limited to one motion to reopen, with certain exceptions which have not been met here." (A.R. 2).[3]

---

[3] Petitioner argues that the BIA erred in holding that his second motion to reopen was "time-barred." Pet. Br. at 12. In fact, however, the BIA held that the motion was barred because it was a *second* motion to reopen. Thus, the second motion was barred by the numerical limitations on motions to reopen.

C. Petitioner was only entitled to file one motion to reopen

The BIA's ruling was correct. Pursuant to 8 C.F.R. § 1003.2(c)(2), a party may file only one motion to reopen deportation or exclusion proceedings, and it must be filed within 90 days after the final administrative decision was rendered. *See* 8 U.S.C. § 1229a(c)(7).

There are exceptions to these numerical and time limitations. *See* 8 C.F.R. § 1003.2(c)(3). These numerical and time limits do not apply to an application for asylum or withholding of deportation based on changed circumstances in the home country. To qualify for this exception, the applicant must present evidence that is "material and was not available and could not have been discovered or presented at the previous hearing." 8 C.F.R. § 1003.2(c)(3)(ii). Here, petitioner's Application for Asylum and Withholding of Removal (I-589) did not even purport to present evidence of "changed circumstances" in Mexico. Rather, petitioner only stated that he would be unable to find a job in Mexico, that he feared his U.S.-born children would be the subjects of discrimination, and that one child was psychologically impaired. (A.R. 18). Such evidence does not establish "changed circumstances" in Mexico sufficient to excuse the numerical and timing limits.

In addition to the regulatory exceptions, some circuits have held that an applicant may also be relieved of these numerical and timing limits because of the doctrine of equitable tolling. The Eighth Circuit has not decided this issue. *See Kanyi v. Gonzales*, 406 F.3d 1087, 1090 (8th Cir. 2005) (Eighth Circuit has not decided whether 180-day filing period pursuant to 8 U.S.C. § 1229a(b)(5)(C)(i) may be equitably tolled).

However, as seen below, assuming *arguendo* that the Eighth Circuit allowed equitable tolling to extend the time for filing and equitable circumstances to increase the number of motions that could be filed, petitioner would nevertheless be unable to sustain his burden of proof. *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 500 (8th Cir. 2005) (petitioner "bears the burden of making a *prima facie* showing of entitlement to equitable tolling, and therefore of filling in any gaps in the record regarding whether his case is a case warranting equitable relief") (quoting *Jobe v. INS*, 238 F.3d 96, 101 n.8 (1st Cir. 2001) (en banc)).

D. Petitioner did not have a constitutional right to counsel

Removal proceedings are purely civil in nature and do not vest aliens with the full panoply of rights bestowed on criminal defendants. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). While an alien has a statutory right to be

represented by counsel of his or her choice, at no expense to the government, *see* 8 U.S.C. § 1229a(b)(4)(A), there is no constitutional right to have counsel during removal proceedings. In petitioner's brief, he does not explain the source of his alleged right to effective legal representation. Indeed, the Eighth Circuit has not held that such a right exists. "Our Circuit has yet to recognize the validity of a due-process claim in a deportation proceeding based on the ineffective assistance of counsel." *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 808 n.1 (8th Cir. 2003); *see also Etchu-Njang v. Gonzales*, 403 F.3d 577, 581 (8th Cir. 2005) (same).

Federal courts have distinguished between discretionary and other relief. "Where an immigration lawyer's alleged ineffectiveness only touches upon the alien's right to seek discretionary relief, the ineffectiveness does not result in a violation of due process rights because the alien has no constitutionally protected interest in seeking discretionary relief." *Guerra-Soto v. Ashcroft*, 397 F.3d 637, 641 (8th Cir. 2005); *see also Etchu-Njang*, 403 F.3d at 585 (no due process claim because cancellation of removal is discretionary); 8 U.S.C. § 1229b(a)(1) (Attorney General "may" cancel removal if requirements met).

Moreover, no constitutional claim exists if the government is not the actor allegedly depriving the injured party of his or her rights. The Supreme Court has

explained that where counsel is privately retained, due process does not guarantee effective assistance of counsel, even for criminal litigants. *See Coleman v. Thompson*, 501 U.S. 722, 754 (1991). Only where the Constitution itself requires effective counsel can the ineffectiveness of counsel be "imputed to the State," such as in criminal trials invoking Sixth Amendment rights. *See id.; see also Wainwright v. Torna*, 455 U.S. 586, 587-88 & n.4 (1982) ("[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely"; no constitutional violation of due process if deprivation is caused by counsel, not State); *Obleshchenko v. Ashcroft*, 392 F.3d 970, 971 (8th Cir. 2004) (expressing "serious doubts" that fifth amendment right to counsel exists in civil deportation proceedings it is not the government who is the actor depriving them of their rights).

In sum, the Constitution does not bestow upon petitioner the right to have effective legal representation in removal proceedings.

E. Petitioner has failed to raise a valid ineffective assistance of counsel claim

Assuming *arguendo* that petitioner was entitled to effective assistance of counsel, he has failed to support a claim that such right was violated.

With respect to ineffective assistance of counsel claims raised in Eighth Circuit cases, the Court follows the principles announced in *In re Lozada*, 19 I. & N. Dec. 637 (BIA April 13, 1988); *see Hernandez-Moran*, 408 F.3d at 499; *Nativi-Gomez*, 344 F.3d at 807. These principles require that petitioner: "(1) submit an affidavit detailing the agreement between him and [his counsel]; (2) show that the allegations of ineffective assistance were communicated to [his counsel] and that [his counsel] was given an opportunity to respond; and (3) submit a statement as to whether a complaint was filed against [his counsel] with the disciplinary authority of the state bar." *Hernandez-Moran*, 408 F.3d at 499.

Here, petitioner has not complied with any of the *Lozada* requirements. Instead, he argues that they do not apply because prior counsel's ineffectiveness is "clear" and "prior Counsel is no longer in the State of Kansas and as such Petitioner is unable to comply with any of the requirements of *Lozada*." Pet. Br. at 13. This argument must fail for multiple reasons. First, petitioner submitted no evidence that prior counsel's ineffectiveness was "clear"; he simply alleged it. He failed to identify a single act or omission of prior counsel that constituted ineffective assistance. For example, he did not identify any evidence that prior counsel should have presented that would have altered the results. Second,

petitioner cited to a Kansas Supreme Court Order of Disbarment regarding his former counsel, but that decision does not explain how former counsel's actions or omissions allegedly prejudiced petitioner. *See* Order of Disbarment, *In re James S. Phillips, Jr.*, No. 08451 (Sup. Ct. Kan. August 31, 2004). Third, even if his former counsel has been disbarred and is no longer in the State of Kansas, that does not excuse petitioner from all of the *Lozada* requirements. For example, he could have, at a minimum, presented evidence of his agreement with former counsel as to the scope of the representation and evidence of his complaints to the state bar disciplinary authorities. Fourth, the fact that former counsel was disbarred does not per se mean that he provided ineffective assistance in this particular case. *See Paz v. Ashcroft*, 113 Fed. Appx. 736, 736 (8th Cir. 2004).

Finally, and perhaps most significantly, "[i]n order to prevail on a due-process ineffective-assistance claim, the [petitioner] must establish that [he was] prejudiced by counsel's performance, by showing that [his] attorney's performance was so inadequate that 'it may well have resulted in a deportation that would not otherwise have occurred.'" *Obleshchenko*, 392 F.3d at 972 (citations omitted) (quoting *United States v. Torres-Sanchez*, 68 F.3d 227, 230 (8th Cir. 1995)). As the Court has explained "this standard is akin to the requirement under the sixth

amendment that there be 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' where 'reasonable probability' means 'a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

Here, Mr. Vasquez-Ramirez made no effort to show how the outcome of his proceedings could or should have been different "but for counsel's unprofessional errors." He failed to submit any evidence that his former counsel should have submitted other evidence or witnesses, made different arguments, or employed a different strategy.[4] He had a full and fair opportunity to present his evidence. He was afforded a lengthy hearing before an immigration judge and presented extensive testimony and documentary evidence. He had the opportunity to appeal, and he took advantage of it. He filed a motion to reopen. At this point, he has not and cannot show how his former counsel's performance harmed him. By failing to

[4] This fact alone distinguishes this case from the cases petitioner cited in support of his equitable tolling argument. *See, e.g., Borges v. Gonzales*, 402 F.3d 398, 405 (3d Cir. 2005) (counsel made fraudulent representations to client regarding his case); *Scorteanu v. INS*, 339 F.3d 407, 413 (6th Cir. 2003) (counsel failed to notify client of hearing); *Rogriguez-Lariz v. INS*, 282 F.3d 1218, 1224-25 (9th Cir. 2002) (counsel missed deadline for filing for suspension of deportation and lied about it).

do so, he has failed to carry his burden regarding any claim to effective assistance of counsel.

II. The BIA did not abuse its discretion in denying petitioner's motion to reopen.

As explained above, Mr. Vazquez-Ramirez was not entitled to file a second motion to reopen. Assuming *arguendo*, however, that he was entitled to have his second motion to reopen considered, the BIA did not abuse its discretion in denying that motion. Petitioner argues that he was entitled to asylum because his older daughter would suffer psychological trauma if forced to go to Mexico, and that children and the disabled generally suffer in Mexico. He also contends that the family's standard of living would not be as high as in the United States, and that economic deprivation may constitute persecution. *See* Pet. Br. at 15-16.

A. Standard of review

As the Court explained in *Kanyi v. Gonzales*, 406 F.3d 1087 (8th Cir. 2005), the Court reviews "the BIA's denial of a motion to reopen removal proceedings for an abuse of discretion." *Id*. at 1089. That discretion is abused "if its decision is 'without rational explanation, departs from established policies, invidiously discriminates against a particular race or group, or where the agency fails to consider all factors presented by the alien or distorts important aspects of the

claim.'" *Id.* (quoting *Feleke v. INS*, 118 F.3d 594, 598 (8th Cir. 1997)). Moreover, "motions to reopen immigration proceedings are disfavored because of the strong public interest in bringing such proceedings to a conclusion, and because freely granting such motions allowed repeated delay 'by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a *prima facie* case.'" *Id.* (quoting *Gebremarian v. Ashcroft*, 378 F.3d 734, 737 (8th Cir. 2004)); *see also INS v. Doherty*, 502 U.S. 314, 323 (1992) (motions to reopen particularly disfavored in immigration proceedings where "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States").

B. Petitioner's second motion to reopen

Mr. Vasquez-Ramirez filed a second motion to reopen so that he could seek asylum or withholding of removal under the CAT, and he submitted his Application for Asylum and Withholding of Removal, Form I-589. (A.R. 11, 13). He asserted that he was seeking asylum or withholding of removal based on his membership in a particular social group. He stated:

> I fear that I might not be able to find a job and support my family. I fear discrimination against my U.S. born children. I fear that one of my U.S. children, Karina, who has a phyological [sic] impairment will suffer for not being adequately protected. I fear as a father of a disabled child.

(A.R. 18).

C. The BIA did not abuse its discretion

The Supreme Court has explained that at least three independent grounds support the BIA's denial of a motion to reopen: (1) petitioner has not established a *prima facie* case for the substantive relief sought; (2) petitioner has not presented previously unavailable and material evidence; or (3) petitioner would not be entitled to discretionary relief. *See INS v. Abudu*, 485 U.S. 94, 104-05 (1988); *see also* 8 C.F.R. § 1003.2(c).

Here, the BIA considered the merits of petitioner's application for asylum and found that he had "failed to establish *prima facie* eligibility for asylum or any other form of relief from removal." (A.R. 2). The BIA did not abuse its discretion in reaching this conclusion. Mr. Vasquez-Ramiriez's evidence does not rise to the level of showing "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2000). "Persecution is the infliction or threat of death, torture, or injury to one's person or freedom, on account of race, religion, nationality, membership in a particular social group, or political opinion." *Regalado-Garcia v. INS,* 305 F.3d 784, 787 (8th Cir. 2002).

Mr. Vasqez-Ramirez has not alleged that he has been inflicted or threatened with death, torture, or injury to his person or freedom on a protected basis. Hardship of the sort alleged by petitioner if he is returned to Mexico does not entitle him to asylum. "Fears of economic hardship or lack of opportunity do not establish a well-founded fear of persecution." *Feleke v. INS*, 118 F.3d 594, 598 (8th Cir. 1997); *see also Ahmed v. Ashcroft*, 396 F.3d 1011, 1014 (8th Cir. 2005) (limited work opportunities did not constitute economic discrimination sufficiently harsh to rise to the level of persecution). "[B]eing denied the right to pursue the educational goals of one's choice and having economic or professional hardship is not persecution." *Elfarra v. Ashcroft*, 88 Fed. Appx. 141, 142 (8th Cir. 2004).

In addition, petitioner has not presented new and previously unavailable evidence. The substance of his second motion to reopen (the only one being appealed here) was identical to the substance of petitioner's first motion to reopen. In petitioner's first motion to reopen, he contended, among other things, that: (1) petitioner's daughter Karina had a psychological disorder; and (2) many children in Mexico have to drop out of school and are out on the streets. (A.R. 85-87). The BIA, in its decision ruling on the first motion to reopen, held that such evidence would not alter the outcome of the case. (A.R. 75). Thus, Mr. Vasquez-Ramirez

failed to make the elements of a *prima facie* case in his first motion to reopen, and he simply reiterated that evidence in his second motion to reopen.

In sum, the BIA did not err in addressing the merits of Mr. Vasquez-Ramirez's second motion to reopen. In denying that motion on its merits, the BIA was well within its discretion. *See Strato v. Ashcroft*, 388 F.3d 651, 654 (8th Cir. 2004) ("The Attorney General has broad discretion in deciding whether to grant or deny the motion.").

CONCLUSION

Mr. Vasquez-Ramirez's petition for review should be denied.

Respectfully submitted,

Todd P. Graves
United States Attorney

By

Lucinda S. Woolery, MO Bar No. 36625
Assistant United States Attorney
Charles Evans Whittaker Courthouse
400 East Ninth Street, Room 5510
Kansas City, Missouri 64106
Telephone: (816) 426-3130
Facsimile: (816) 426-3165
Attorneys for Appellee-Respondent

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee-Respondent Alberto Gonzales were mailed this 21st day of July 2005, to the following:

William Michael Sharma-Crawford
Sharma-Crawford, Attorneys at Law, LLC
7208 W. 80th, Suite 202
Overland Park, KS 66204

_____
Lucinda S. Woolery
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Civ. P. 32(a)(7)(C), I certify that this brief complies with type–volume limitations and has 5,571 words, excluding the parts of the brief exempted by Fed. R. Civ. P. 32(a)(7)(B)(iii). I further certify that the diskettes submitted to the Court and opposing counsel have been scanned for viruses and are virus-free. This brief has been prepared using WordPefect word processing software, Version 9.

_____
Lucinda S. Woolery
Assistant United States Attorney